CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT, JULY TERM, 1821.

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GENERAL RULES.

General Rules.

During the July term, no application for a rehearing will be received, unless the petition be filed with the clerk, within four days after the judgment or decree is pronounced.

The rule of this court, relative to the filing of notes of the points and authorities in each case set down for hearing, will after the seventh day of October next, be amended, by substituting in place of these words, *and no rehearing shall be granted on any point which the parties may have omitted to furnish, in compliance with this rule*, the words, *and if any point, not stated in the notes of either party, be made by him at the trial, the opposite party may be allowed, if he desire it, four days to answer such points in writing.* 9 *Martin*, 641.

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KIRKMAN
vs.
WYER.

KIRKMAN vs. *WYER.*

APPEAL from the court of the first district.

The affidavit to obtain an attachment, may be sworn to before the deputy clerk.

Judgment may be had against the bail, without the suit being formally set down.

The assignment of the bail-bond, need not be proven, when the general issue is not pleaded, nor the assignment denied

Preston, for the defendant. William Wyer, is called upon as bail of the defendant, Hamilton, to pay the amount of the judgment rendered in this case, in favor of the plaintiff, against the said defendant. To exonerate himself from this demand: he contends, first, that H. Farrie, who purports as deputy clerk of the district court, to have received the affidavit of the plaintiff, to hold the defendant to bail, and subsequently to have issued the writs of *fieri facias* and *capias ad satisfaciendum* in this case, was not an officer known to the laws of the state of Louisiana, or authorised to exercise the functions of clerk of the district court. The question is, whether the clerk of the district court is authorised by law to appoint a deputy with power to administer oaths and issue executory writs, I contend that he is not. The system of exercising offices by deputy is essentially contrary to good policy; those men are appointed to office who are supposed to be best qualified to discharge the duties of the office. They are adequately paid by the

state, and the state expects, and has a right to expect, the performance of those duties by them. If I employ a lawyer to advocate my cause, and give him an adequate fee, he violates his trust, by confiding my case to another. Besides, justice requires that he who does the labour of an office should enjoy the honor and profit attached to it. If the profits be such that the officer can live on them, beside paying his deputies for doing the duties of the office, they are too great and ought to be reduced. The state in such a case pays more than an equivalent for the advantage it receives, and the office is a sinecure. But sinecures are a curse to any country and are peculiarly repugnant to the spirit of our government. My premises then are, that the exercise of public offices by deputy, is generally opposed to good policy, contrary to justice, and repugnant to the spirit of our government. The conclusion, I think is reasonable, that if it be permitted in any case it must be by express law.

Previously to the act of 1817, no one will pretend that power was granted by law, to the clerks of our courts to administer oaths, or issue writs by deputy. The act of 1813, or-

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ganizing our courts, declares that there shall be appointed in each parish, a clerk, who shall be sworn in the manner prescribed by the constitution, and whose duties and functions, until otherwise prescribed, shall be the same which were before fulfilled by the clerks of the late superior court. The act does not authorise the appointment of clerks to each court by the judge, but a clerk; much less does it authorise the appointment of deputy clerks, by the clerk. The previous laws in speaking of the duties and functions of the clerks of the superior court, invariably use the term clerk, or clerks; they no where recognise a deputy, nor power to perform those functions vested in any other person than the clerk.

The section of the act which gives part of the power which has been exercised in the present case, by a deputy, is, in these words, "That the clerks of the superior and county courts, be, and they are hereby authorised to take affidavits, for holding debtors to special bail." *Act, July* 3, 1805, *sec.* 8. The act which gives the remaining power, which has been exercised in this case, that of issuing writs of execution, prescribes the very form

of those writs, and in directing how they shall be signed, declares that they shall be signed, "S. H. clerk." *Act*, 10*th April*, 1805, *sec.* 14.

The important functions exercised by deputy, in the present case, could not then be legally exercised by deputy, previously to the act of 1817. Does that act grant the power of exercising them by deputy? It does not. When we look at the terms of the act there is not a donatory term contained in it. It is a prohibitory act altogether. How powers can be granted by prohibitory terms, is to me inexplicable. I think the English language does not admit of such a solicism. When we look to the object of the law, we find that it was not to create new officers, but to prescribe regulations of a prohibitory character, with regard to officers already legally created; to prescribe the compliance with certain formalities as a precedent condition to their exercising the functions of their office.

The application of the law of 1817, is seen and felt without applying it to the deputies of clerks. It is applicable to the deputy of the attorney-general, and to the deputies of the sheriff, which our legislature thought it ne-

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cessary to create by express statute. Our legislature in enacting these deputies by express statute, it seems to me, have, by implication, prohibited other officers from acting by deputy on the principle, *inclusio unius est exclusio alterius.* In numerous instances, the legislature have given power to public officers to act by deputy. They have even provided that a deputy may be appointed to the inspector of the levee. *Acts* 1816, 112. As to pilots, *Acts* 1806, 100. If they deemed express legislative provision necessary to authorise so trivial an officer, to act by deputy, is it not conclusive that an important officer charged with our liberty and property, cannot confide such a trust to a deputy without legislative provision?

The mode of reasoning, I presume, by which they arrive at the conclusion, that power is granted to clerks to appoint deputies, by the act of 1817, is of this kind. The clerks were in the habit of acting by deputy, previously to that act, to the knowlege of the legislature. By speaking of deputies generally in that act, it is presumed they intended those who were employed in practice, as well as those who were authorised by law:

that therefore, by implication, they sanctioned what had been done, and then existed. To this I answer, that those deputies who were employed in practice, without the previous authority of law, were wrongfully and illegally employed, and that the legislature cannot be supposed by implication, without express words to sanction that which was wrong and illegal. Indeed, I think I might advance it as a sound principle, that offices cannot be the result of implication, they must be enacted by express words.

It is urged that the security in the bail bond, cannot take advantage of the fact that the affidavit was not received by an authorised person, nor the writs of *fieri facias* and *capias ad satisfaciendum*, issued by a person authorised to sign them. On this point I might enlarge much, but cannot persuade myself that it is necessary. Our statute of 1808 makes the affidavit the very foundation of the bail, of the authority of the sheriff to arrest the defendant. If he be arrested without an affidavit, he is not in legal custody, but in false imprisonment. The bail bond, like every other bond, must have a consideration. Its true, consideration is the discharge of the defen-

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dant from legal custody. His discharge from false imprisonment is no consideration, it is the duty of the sheriff without a bond. A bond founded on such a pretence is therefore without consideration, and void, both as to principal and security.

The authority quoted from the English law, that the security cannot take advantage of the want of an affidavit, is not adverse to this conclusion. By the English law, bail was demandable before the statute requiring an affidavit. That statute required an affidavit of the amount of the debt, not as the foundation of the demand for bail, or a condition precedent to obtaining it, but merely as a direction to the sheriff, as to the amount of bail. See 1 *Burrows' Rep.* 332. But our law is different. Bail could not be demanded before the statute. It is the very foundation of that process. It requires that an affidavit shall be made as a condition precedent to arresting the defendant. With regard to the writs of execution, it is still more clear, that the security may take advantage of the want of, or defect in them. The very condition of the bond is that the defendant shall surrender himself in execution. If the executions are signed by

persons not authorised to sign them, it is the same as if no executions had been issued at all, and no legal executions having been issued, the defendant cannot legally surrender himself in execution. It is legally impossible for him to break the condition of his bond. It is therefore not forfeited, and the security cannot be rendered liable.

The consequence of the decision, I demand, is urged against it as a strong argument. The argument *ab inconvencienti*, should have but little weight in a question of pure law. The consequence may be, that in very few cases, creditors who have resorted to the severe process of arrest against their debtors, may be remitted to those debtors again, instead of compelling their securities to pay their debts for the friendly, generous act of releiving them from prison. Some creditors who hoped to secure their debts from those who do not owe them, will be disappointed, and compelled to resort for payment to those who do. This, in my opinion, is a very small consideration. The evils consequent on a contrary decision are far more serious. The statute requiring an affidavit, to hold to bail, was intended to protect the liber-

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ty of the citizen, by the pains of perjury, from false imprisonment. But however solemn the asseveration of a person, to that which is false, he cannot be convicted of perjury, unless it be received by a person authorised to administer oaths. Now it is impossible that a court of criminal jurisdiction, on an indictment for perjury, could convict the accused for a false oath, received by a person of so dubious authority as H. Farrie. This court then, by deciding that an oath so taken is sufficient to hold to bail, would break down the barrier which the law has erected between the liberty of the citizen, and oppression under the forms of law.

If the act of 1817, authorises the clerk to appoint a deputy, H. Farrie has not been appointed in the manner prescribed by that act, nor has he complied with those requisites of law, which authorise him to act as a deputy. That act requires that the acceptance of the deputy shall be recorded on the day on which he is presented as such, and takes the oath of office, in the office of the clerk of the court. The evidence shews, that this has not been done. The third section of an act passed the 6th of February, 1815, prescribes that

the oath of office, of officers of limited jurisdiction, shall be recorded in the clerk's office of the parish. The evidence shews that this has not been done.

In the next place, I have urged as a reason for remanding the cause to be re-tried by the district court, that the judge of that court compelled me to trial on Saturday, in violation of the established rules of practice of that court, with regard to fixing ordinary causes for trial. I am answered, that judgment is demanded against the bail, by motion, and that Saturday is fixed for the hearing of motions. This court have decided in the case of *Labarre* vs. *Fry & Durnford*, that "the proceeding against bail is, in its nature, an original action, and that the bail is entitled to the same privileges on the trial, as if suit had been commenced by petition. It has every feature of an original suit, except that it is carried on by written notice of a motion, instead of the ordinary petition." The court say, further "proof is required of the obligation, on which judgment is sought in the same manner, as in the common case of a promissory note; judgment is given for the first time on this proof, and an appeal lies from it to

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this court." The court then solemnly decide, that the bail is entitled to a jury. They decided the same principles in the case of the *State* vs. *Montegut and others*, "that a summary proceeding must be a legal one, that summary and arbitrary were not synonymous terms." On the authority of these decisions, I maintain that the proceeding against bail, when contested by him, loses the character of a mere motion, and becomes the *contestatio* of the Roman law. The suit is at issue by our law, and is governed by the rules of practice established for other suits at issue, and is entitled to all the privileges belonging to them.

The last point on which I rely, in exoneration of the bail is, that the assignment by the sheriff to the plaintiff, was not proved on the trial. I urge this point, on the supposition that the bond has been regularly taken, payable to the sheriff. If the bond is legally taken, payable to the sheriff, of course, the sheriff must assign it to the plaintiff, in order to enable him to recover judgment. The question is, whether the proof of that assignment was necessary on the trial. It is contended that it was not, in this particular case, because I admit the assignment by not de-

nying it in my answer. This reasoning is founded on decisions of this court, in effect, that if facts are alleged in the petition, and not denied in the answer, they are to be taken for confessed, on the trial. This was certainly stretching logic to its extent, especially when we consider, that if the defendant had filed no answer at all, the allegations in the petition, except in particular cases, would not have been taken for confessed, but the plaintiff would have been required to prove them. But the decisions are not applicable to the present case. In this case before the court, there is no petition; there are no formal allegations to avow or disavow. By answering one thing, we do not admit others, because they are not alleged against us. I boldly say, no person can see in my answer, an admission of the assignment of the bail bond, unless he is predetermined to see it.

It is next contended, that it is not necessary to prove the execution and assignment of the bail bond in any case. I maintain, that it is necessary in every case. It was deemed necessary in England, from whence we derive the principles of our bail; because, it was invariably practiced. The English statute re-

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quired, that the assignment should be proved by two witnesses. 1 *Sellon's Prac.* 176. It has been the invariable practice, in this state, to prove the execution and assignment of the bail bond. The plaintiff seems to have deemed it necessary, in the present case, in requiring of me the admission of the execution of the bond, for surely no reason can be given why proof of the execution of the bond must be made, if proof of the assignment can be dispensed with. The proof of the assignment was peculiarly necessary in the present case, because the bond purports to have been assigned by a deputy-sheriff. We do not know all the deputies of the sheriff, and could not know, therefore, whether the bond was assigned or not. But one thing we do know, which is fatal to this action, that a deputy-sheriff cannot assign a bail bond. See *Strange's Reports*, 60, the case of *Ketson* vs. *Fagg*. In the case already cited, of *Labarre* vs. *Fry & Durnford*, this court have said, "that proof is required of the obligation on which judgment is sought, in the same manner as in the common case of a promissory note." Now, who ever recovered judgment as assignee of a promissory note, without proving the assignment?

But why search for authorities in support of a principle founded on the first axiom of our law of evidence. "He who claims the execution of an obligation, must prove it." *Civ. Code*, 304. A record of court, or notarial act under seal, proves itself. A bail bond is neither. The sheriff's officer is obliged to receive it, in whatever place he arrests the defendant, if security is offered.

There is still another ground on which I rely with considerable confidence, for the exoneration of the security. In my opinion, the bond in the present case, was not taken in pursuance of the statute. If so, it is void. See *Pennington's Reports*, I beseech the court to examine, attentively, the 10th section of the act of 1808, under which this bond was taken, and decide this point. This bond is payable to the sheriff and assigned by him. That act does not authorise the sheriff to take the bond payable to himself, and the fact, that nothing is said of the assignment, proves, conclusively, that the statute contemplated a bond, payable to the plaintiff, of which no assignment was necessary. The act declares, that if the condition of the bond shall appear to be broken, judgment thereon shall be ren-

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dered against the security. If the legislature had intended, that the bond should be taken payable to the sheriff, they would have declared, that the bond should be assigned, or that judgment should be rendered in favour of the sheriff, for the use of the plaintiff.

I am supported in this construction of the 10th section of the act, by its comparison with the 13th section, relative to the prison bounds. The 13th section declares expressly, that the bond shall be given to the sheriff; the 10th does not; the 13th section declares, expressly, that the bond shall be assigned; the 10th does not. So the 12th section of the act of 1805, commonly called the *ne-exeat* law, expressly declares, that the bond shall be taken payable to the sheriff, and shall be by him assigned. So the English statute prohibited the sheriff from taking the obligation to any person, only himself, and by the name of his office. 1 *Sellon's Practice*, 128. If our legislature had intended to follow these statutes in principle, they would have followed them in words. But by prescribing a bail bond, without mentioning to whom payable, they manifestly intended, that it should be taken payable to the person interested, the plaintiff in

the cause, by prescribing a bond on which, if broken, judgment should be rendered for the plaintiff, they manifestly intended a bond to which the plaintiff was obligee. Such a bond has not been signed by my client, and however he may be sued on his contract with the sheriff, he cannot be prosecuted by motion, as bail of the defendant.

If the objections I have made to the demand of the plaintiff, render this a doubtful case, surely the court will incline in favour of my client. In every case, *melior est conditio possidentis*, and how much more so in the present case, when my client is called upon to pay the debt of another, merely on account of the excess of his generosity. It is true, I have insisted upon strict law, but this court will not depart from strict law, nor permit ministerial officers to depart therefrom. If they do, they at once cut the cable on which every man in the community has anchored his fortune, and launch us into an ocean of lawless uncertainty, whose shores we shall never see.

Livermore, for the plaintiff. It is objected, that the plaintiff is not entitled to a judgment against the bail, because the affidavit was

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sworn to before the deputy clerk, and because, the writs of *fi. fa.* and *ca. sa.* were signed by him, and not by the principal clerk. On the first ground it is contended, that the bond is void; and on the second, that the condition has not been broken.

With respect to the first objection, I will not deny, that the power to administer an oath, being a judicial act, cannot be extended to mere ministerial officers, except by express provision of law. Clerks of courts are properly ministerial officers, and are not competent to administer oaths, except in the presence and under the direction of the court. But the power to take affidavits, in certain cases, is given to them by statute. As ministerial officers, have they not a right to act by deputy? Generally, this is a right attached to ministerial officers, and it is a right which can only be confined by statute. The right of a sheriff to appoint a deputy, is incident to his office. 9 *Rep.* 49. And although this right has been sanctioned by an act of the legislature, it does not follow, that he would not have had the right, independent of that act. We find, that in the superior courts of Westminster-hall, most of the clerks have deputies.

Here they have been always known, and have been considered as duly authorised to act for the clerks. The act of 1817, *sec.* 27, concerning the practice of the courts, expressly recognises them, and requires, that they should be sworn, and a record made of their appointment and acceptance. It is said, that this action applies only to the deputies of the sheriff and of the attorney-general. The statute speaks of the deputies of "officers of the courts." This must mean more than the sheriff, for he is but one; and I find no statute which gives to the attorney-general the power of appointing a deputy. His office is neither judicial nor ministerial; but it is a trust and confidence which he cannot transfer. Supposing then, the appointment to be legal, I submit it to the court, whether the power given by statute, to the clerk, to take affidavits, must not be considered as extending to his deputy.

But, supposing the affidavit to be insufficient, or that there was no affidavit, the objection cannot be made in this stage of the proceedings. The object of the act, in requiring an affidavit, is to save persons from vexatious arrests, by requiring some proof,

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that something is due. It is a provision, introduced for the defendant's benefit, and may be waived by him. If arrested without an affidavit, or upon an insufficient affidavit, he may apply to the court to be discharged, or he may give bail, and apply to have the bail bond delivered up to be cancelled. If we do neither, he admits the previous proceedings to be regular. Upon this application he would be entitled to his discharge, because there would be no evidence of the debt. But if he appear and plead, and the cause proceed to a final judgment against him, the debt is then established by the highest evidence. The acts of 1805, and 1807, 1 *Martin's Dig.* 474, 480, being in *pari materia*, may be resorted to, for the purpose of interpreting the act of 1808, and to shew that the intention of the legislature, in requiring an affidavit, was merely to satisfy the court of the existence of the debt. By the two first of these acts, the defendant was permitted to shew, by evidence, that the facts stated in the affidavit were untrue, and to be discharged upon proving this to the satisfaction of the judge. But if he suffered the proper time to pass, he is precluded. Upon the trial of a cause, if a deposition be offered

in evidence, which has not been properly taken, it will not be admitted if objected to, for it is no evidence; but if no objection be made at the time, the party against whom it is offered, will be precluded from shewing this on motion for a new trial, or upon an appeal. This question has been expressly decided in England, upon the statute, 12 G. I. *c.* 29. This statute requires, that an affidavit shall be made of the cause of action, and that the sum sworn to shall be endorsed on the back of the writ, "for which sum or sums so endorsed, the sheriff, or other officer, to whom such writ shall be directed, shall take bail, and for no more." Upon this it has been held, that the bail bond is not avoided, where there is no affidavit of the cause of action, or the sum sworn to is not endorsed on the back of the writ, or the sheriff takes bail for more than the sum sworn to and endorsed on the writ. 1 *Burr.* 330. 2 *Wils.* 69. 1 *H. Black.* 76. But the court will discharge the defendant on motion, if made in proper time. I am unable to comprehend the distinction which is attempted to be made between the English statute and ours. Before the act of 1808, the defendant could not be held to bail without proof

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of an intention to depart from the territory; and by that act, an affidavit of the debt was required. After the statute of 12 G. I. an affidavit of the debt, and an endorsement of the sum sworn to was required, in order to authorise the sheriff to take bail, and the sheriff was prohibited from taking bail without the affidavit and endorsement. Whatever legal power, therefore, the sheriff had before the statute was taken from him, and the arrest of the defendant, where the provisions of the statute were not complied with, was as illegal as if bail had never before been required. This is proved by the discharging of the defendant on common bail, for want of a sufficient affidavit. How can the affidavit required by our statute, be considered as a condition precedent, more than the affidavit required by the English statute? It is said that the affidavit is the very foundation of the bail. This is a mistake. The debt is the foundation, and the affidavit is merely required as evidence. This, like all other evidence, may be dispensed with by the party against whom the evidence is required. As to the doctrine of want of consideration, the gentleman ought to know, that it has no application to bonds.

Another objection taken to this bond is, that it is made to the sheriff, and not to the plaintiff. The bond required by the act is a bail bond; and when the legislature speaks of bail bonds to be taken by the sheriff, it must be presumed, that it is with reference to the system of laws from which they have been introduced, and that a bond to the sheriff, by his name of office, is the bond intended. Besides, it is a settled rule of law, that courts will not decide against a long course of practice, unless that practice be most clearly against law.

The above are the only objections which go to the right of the plaintiff to recover from the bail. These which remain to be considered, respect only the right to have the present judgment affirmed, and the real purpose of the defendant, Hamilton, which is delay.

It is said, that the condition of the bond has not been broken, because no writs of execution have been issued. The condition of the bond is, "that in case the defendant in action, shall be cast in said trial, that he will pay, and satisfy the said condemnation of the court, or surrender himself in execution to the sheriff." The objection is, that no legal exe-

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cution having been issued, it was impossible for the defendant to have surrendered himself in execution. I believe, however, the defendant might have surrendered himself in execution, even if no writ of execution had been issued. The writs of *fi. fa.* and *ca. sa.* were signed by the deputy clerk. The issuing of these writs, is a mere ministerial act, and as such, may be done by deputy. Great stress is put on the circumstance of the legislature having prescribed a form for the writ of *fierie facias*, and that it is to be signed "S. H. clerk." Whereas, the *fi. fa.* in this case, is signed "H. Farrie, dy. clerk." Independent of the act, the signature of the clerk would not be required. The writs of *fi. fa.* and *ca. sa.* are borrowed from the common law, and we find from the form given by *Blackstone*, that they are not signed by any clerk, but tested by the chief justice. This, and the seal of the court, mark their authenticity. The form of the writ of *capias ad satisfaciendum* is not given by our legislature, nor is it required that it should be signed by the clerk. The question concerning the appointment of a deputy clerk, cannot be material in this instance; for the validity of the *fi. fa.* cannot be brought in question in

this stage of the proceedings. It is sufficient that a writ of *ca. sa.* has regularly issued after the lapse of time allowed, and that it has been returned *non est inventus.* If the writ of *ca. sa.* issued irregularly, it might have been quashed. But it is too late to contest its regularity after the return.

It seems, however, that this cause was tried on Saturday. It is not alleged that any injury was sustained by the defendant on that account, except in point of time. But delay was wanted, and the refusal to grant it is alleged as an act of tyranny and oppression. The observations of the court, in the case of the *State* vs. *Montegut*, are quoted, to shew that summary and arbitrary are not convertible terms; but certainly summary and dilatory are not synonymous. The arguments of the court in *Labarre* vs. *Durnford*, are also quoted. The arguments of the court are to be considered with reference to the matter before them. In *Labarre* vs. *Durnford*, the question was, whether the bail was not entitled to a jury to try a fact in issue between the parties. It is true, that injustice should not be done in summary proceedings, and that where good cause can be shewn for delay, it should be granted,

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as in other cases. The bail is entitled to the same privileges on the trial as if the suit had been commenced by petition. "But it does not follow that he is entitled to have the cause tried in the same order as other causes." The act gives to the plaintiff the right to have judgment, on motion against the bail, after ten days notice. Upon the expiration of the ten days, the bail may appear and shew cause why judgment should not be rendered against him, and it would be the duty of the court to decide immediately upon the matter, unless some good cause could be shewn for putting off the hearing. Can the prayer for a jury have any further effect, except so far as is incidental to the summoning and return of a jury? Certainly it would defeat the intention of the legislature to sustain this objection.

The next objection is, that the assignment of the bail bond, was not proved. The bond purports to be assigned by the sheriff, and is returned with the writ, as is prescribed by the act. The assignment of the bond, and the return are by the same deputy, and the bond thus returned, with the assignment on its back, has always since remained in the custody of the court, as a part of the record. Under these

circumstances, I conceive that the highest evidence of an assignment of the bond is before the court; and that the English rule, which requires proof of the assignment by witnesses, is not applicable to this case. The difference is, that here the bond makes part of the return; whereas in England it remains in the sheriff's possession until it be assigned. Certainly there is *prima facie* evidence in this case, that the bond has been assigned.

A further answer to this objection is, that the assignment was not in issue between the parties. Evidence is to be applied to the issue, and what is not disputed need not be proved. The statute requires proof of the breach of the condition, even where the bail makes default; and this is proved by the sheriff's return upon the *ca. sa.* In case the bail did not appear at the expiration of the ten days, the plaintiff would not have been obliged to prove the execution of the bond, the assignment, nor any thing else, but that the condition had been broken. But the bail may appear and answer, may deny that he executed the bond, may shew that he was a minor, under curatorship at the time, or that the *ca. sa.* has not been returned, or any other matter which may shew

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that he is not liable; and any matters of fact which he may put in issue, he is entitled to have tried, and by a jury if he please. He cannot, however, require the plaintiff to prove any fact which he does not deny. The only matter put in issue by the answer in this case is, whether W. Wyer did execute the bail bond, and whether that bond be good or void. It is substantially the plea of *non est factum*. Under this plea the plaintiff has only to prove the execution of the bond, and need not prove the writ or the assignment by the sheriff. *Peake's Ev.* 269. The defendant contends, that the assignment by the sheriff must be proved in the same manner as the endorser of a promissory note is bound to prove the hand writing of the first endorser, upon the general issue of *non assumpsit*, or *nil debet*. The cases are very different. The rules of evidence upon this subject of proving the hand writing of the first endorser are taken from the common law; and that proof is required by the same rule of evidence, being applied to the pleadings. The plea of *non assumpsit* not only denies the making of the note, but also the title of the plaintiff. If the note has not been endorsed to him, then the law raises no *assumpsit* from the defendant to him.

The last ground of defence is, that a deputy sheriff cannot assign the bail bond; and to prove this, a case in *Strange* is cited, which proves the precise contrary, for it is there laid down, that the under sheriff may assign the bond in the sheriff's name, but that the under sheriff's clerk cannot. The under sheriff is the sheriff's deputy, and all official acts of the sheriff may be done by his deputy.

MARTIN, J. This is an action on a bail bond, against the original defendant and his bail; there was judgment for the plaintiff, and the defendants appealed.

They contend that the judgment ought to be reversed.

1. Because, in the original suit, the oath required by law, previously to the defendant being held to bail, was not made before the clerk, or judge of the court, or any person authorised by law, to administer it; consequently bail was irregularly required, and the bond is void. So no legal *fi. fa.* or *ca. sa.* issued, therefore, the bond, if not void, is not broken.

2. Because, the present suit was fixed for trial, and tried contrary to the rules of the district court.

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3. Because, the assignment of the bail bond was not proved.

1. The plaintiff and appellee replies that the oath was properly taken before the deputy of the clerk of the district court, and if this was irregular, the objection is taken too late.

2. The rule of court, alluded to by the defendants, does not apply to the present case, and the plaintiff had a right to have a jury impannelled *instanter*.

3. The assignment is admitted by the pleadings; the only issue being bail or not.

4. If it ought to be proven, this ought to have been required in the district court, and a non-suit claimed. After a general verdict, every thing requisite must be presumed to have been proved.

5. The present suit is under the act of 1808, 16, *sec.* 10; no assignment, or at least no proof of it is required, and the court is directed to give judgment, on proof of the breach of the condition. This act differs from that of 1805. If the plaintiff objected to the sufficiency of the bail, he was required to file his objection within ten days. If none were filed,

he was precluded from any recourse against the sheriff, and the bond was assigned. Under this act, the proceedings are for the benefit of the sheriff, as well as the plaintiff.

I. Clerks of courts have had deputies ever since the establishment of the American government in this country; and the act of 1817, appears to have recognsied such deputies. The clerk and the sheriff are the only officers which the legislature may have had in view under that act. The attorney-general is not an officer particularly attached to any court. It seems to me, to be too late now to call in question acts done by a deputy clerk.

A deputy clerk may do all acts which his principal can; the administering of an oath, though pretty generally done by a judge, does not seem of itself to be an act strictly in the province of a judge. He pronounces a *formula*, and *certifies* that the party swears; this certainly is not exclusively a judicial act, and does not require the exercise of more judgment than many acts performed by ministerial officers. I think the affidavit was legally taken by the deputy clerk.

There were a regular *fi. fa.* and *ca. sa.* in

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the cause. Such writs may be issued by a deputy, and when he pursues a form prescribed by law to his principal, he follows it *mutatis mutandis*.

The entry on the record, that the person acting as deputy clerk, was sworn as such, and his deposition, that he has constantly acted as such, shew him to be deputy clerk *de facto*, and his acts as such are entitled to credit, even if an informality was shewn in his appointment.

II. Judgment is taken, according to law, against bail on motion. In such a case like that of a rule against syndics, why they should not be ordered to pay a sum of money, the proceedings are in a summary way; that is to say, a trial or hearing is without a formal setting down of the cause, but the party at the trial or hearing has every advantage which is enjoyed in a case commenced by petition. *Meeker's ass.* vs. *Williamson & al. syndics.* 7 *Martin*, 315. I think the case was regularly brought on.

III. There was not any need of the proof of the assignment of the bond, as the general issue was not pleaded, and the assignment was not denied.

I think the judgment should be affirmed with costs.

MATHEWS, J. The grounds relied on by the appellant for a reversal of the judgment are: 1. Want of authority in the deputy clerk, to administer the usual oath on which bail may be required. 2. A violation of the rules of the district court, in the trial of the case against the bail, and want of proof of the assignment of the bail bond by the sheriff.

I believe it may be laid down as an undeniable fact, that the clerks of the different courts of the late territorial government, were in the constant habit of acting by deputy, wherever their convenience required it. The same practice has prevailed under the state government; without its legality or propriety having been ever before called in question. It has then been a custom coeval with the American government of the country, and even were we to allow that it originated in error, the maxim would then (if in any case) apply that *communis error facit jus.* I am of opinion with judge Martin, that this custom has been sanctioned by the legislature in the act relative to deputies of the officers of our courts.

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Being satisfied with what has been expressed on the subject of the right of a deputy to perform all the duties which may appertain to the office of his principal in conformity with the general rule, that *qui facit per alium, facit perse*, and also with that part of judge Martin's opinion, which relates to the trial of the case in the court below. I shall barely remark that as the execution of the bond is not denied, or rather seems to be admitted, on the part of the bail, the plaintiff was not obliged to prove the assignment of the sheriff. See *Peake's Evidence*, 269.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

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A rehearing denied.

Mazureau, the attorney-general, as *amicus curiæ*, made application for a rehearing, in this case, on the following grounds.

1. The decision is, to all intents and purposes, a definitive judgment. No appeal can be had against it.

As such, it ought to contain a reference to

the particular law in virtue of which it was rendered.

Now the truth is, that it refers not particularly to a law, but generally to the third *Partida*, which contains 616 laws.

Which of them is the particular one that is referred to?

It is obvious, that the requisite of the constitution has not been complied with.

The necessary conclusion is, that the decision is null, as being unconstitutional. *Constitution of the State, sec.* 2, *art.* 4. 4 *Martin*, 463.

2. The offence of contempt is unknown to the Spanish laws.

Advocates were bound to be modest; to address courts in a respectful manner and language.

They could be suspended for divers causes; but those causes are all declared and enumerated in different laws; and constitute each a separate offence. They are no where described under any general name or appellation. And an appeal was allowed of the judgment that ordered the suspension. *Villadiego*, 250, *n.* 26. *Partida*, 3, 6, 7, 11, & 12.

3. The Spanish law forbids the judges to suffer lawyers to speak to them in an insolent

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manner; but, in that respect, the law is not penal. It only contains instructions to the judges, in order to save them from incurring contempt. *Partida*, 3, 4, 8. *Villadiego*, 251, *n.* 50.

With the same motive, the law forbids also the judges to live with any advocate or notary, *Recopilacion de Castilla*, 6, 2, 59.

It cannot be said, I suppose, that the lawyer or advocate, who is suffered to do either the one or the other, is guilty of contempt.

The judge's duty is to forbid it; and if it is persevered in, then, but not until then, the provision of the *Part.* 3, 6, 7 may be applied; not as a punishment for contempt, but as a punishment for the breach of a positive and particular law.

4. Admitting the offence of contempt to be known to the Spanish laws, and thereby punished in the manner laid in the decision of this honourable court; the statute of the state has, with respect to the punishment, repealed the Spanish laws.

The true rule is, I believe, that the new laws, providing on the same subjects as the old ones, in a different manner, repeal them virtually.

This holds chiefly in penal cases; for the same offence cannot be punished in two different manners.

The rule besides, is laid down and put into practice in the *Recopilacion de Castilla.* 2, 1, 3.

Now, De Armas was, according to the rule made by the supreme court against him, charged with the offence of contempt, and from the judgment, passed after hearing him, it appears he was found guilty of it.

An offence of that description can only be punished by fine and imprisonment. See an act to organise the supreme court, &c. passed on the 10th of February, 1813, *sec.* 13.

MARTIN, J. observed that the rehearing was not prayed for, with the hope of shewing the absence of guilt in the defendant, nor on the ground of the punishment inflicted being excessive.

1. That the case relied on by the counsel, *Gray & al.* vs *Laverty*, 4 *Martin*, 436, in order to establish his first position, (*viz.* that the judgment of this court is unconstitutional and null; the reference being only to the third *Partida*) proves the contrary proposition, even in the case of a judgment, which contains no

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reference. "When it (the reference) is not made, those who are to pass on the conduct of the judge, in case he may be prosecuted therefor, may make a strict enquiry; but a court who is required to reverse a judgment, may fairly conclude, even when the reference is obvious, that it was impossible for the judge to make it, on the score of his having been ignorant of it. So, a good judgment, rendered according to the light of the judge's understanding, must be supported."

The absence of any reference at all does not, therefore, render the judgment null.

The judge may not be ignorant of the law on which he pronounces; he may well recollect the very words of it, and yet not remember the number of the chapter, nor the page of the text; and the volume containing it may be out of his reach. There are certain parts in the state, in which a particular volume, containing the textual law on which a judgment is grounded, may not be within a circle of one hundred miles. Will it not suffice there, that the judge should refer to the particular law, by quoting its very words, or referring to the particular volume which contains it?

The framers of the constitution foresaw this, and required the reference to the particular law, as often as it may be possible; but the reasons in all cases.

"The ignorance of a particular law," said the court, in the case quoted by the counsel, "is possible, in a judge not bred to the profession; it may exist even in those who are; but it cannot be presumed, that a judgment was rendered, without the judge knowing the reasons which determined him." *Id.* 464.

In the present case, the law on which the judgment is grounded, is referred to by the volume which contains it, the third *Partida*, and by its contents, *viz.* that which forbids the judges to suffer the arrogant and indecorous language of lawyers; and the clerk assures us, he informed the defendant, when he permitted him to take a copy of the judgment, that the court had made enquiry for the volume, and finding that it was not within its reach at the moment, observed the reference might be extended at leisure.

2. That contempt of court is an offence noticed by the Spanish law. Judges are directed so to demean themselves, that their authority may not be contemned: *que no les*

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nasca en despreciamento. Part. 3, 4, 8; as *Lopez* expresses it, *quod honori suo contemptus non generetur*; or according to the Roman law, *ne contemni patiatur. ff.* 1, 18, 20. "This," proceeds the *Partida*, "would be, if any one was to argue before them with arrogance, *con sobervia. Loco citato.*

Lawyers, who demean themselves contemptuously before the court, may be suspended. The laws, cited by the counsel, contradict his assertion, that the causes, for which suspension may be pronounced, are all declared and enumerated in different laws, and no where declared under any general name or appellation.

If the judge, by his sentence against any lawyer, on account of his ill fame, or any other just cause, *o por alguna razon derecha*, forbid him to practice, he will no longer be permitted to practice. *Part.* 3, 6, 11.

If the judge forbid any lawyer to practice before him, for any just cause, *por alguna razon derecha*, during a fixed period: as if the lawyer be tedious, contradictory, or for speaking too much, or for any other like cause, *for alguna razon semejante destas*, henceforth he may not practice. *Part.* 3, 6, 12.

Lawyers should not interrupt each other, nor should they make use, in their arguments, of any improper or indecent expressions, &c. Those who conduct themselves, as is here ordered, are to be treated with respect, and listened to by the judge; and he may prohibit those from speaking before him, who conduct themselves otherwise: *e a los que contra esto feciessen, puede les defender, que no razonen ante el. Part.* 3, 6, 7.

3. That the Spanish law, which thus forbids the judge to suffer any contempt of his authority, is a penal one. For it cannot be carried into effect without inflicting some penalty. And a lawyer guilty towards the court, of any contemptuous action, expression or gesture, may be instantly punished, by suspension, at least; and nothing, as is gratuitously asserted, requires the judge to forbear punishing, till the offence be repeated.

4. That no statute of this state has repealed those parts of the law of Spain, which authorise a court to punish the contemptuous behaviour of a lawyer, by suspension.

A statute is said to repeal a former one, when it is contrary thereto in matter. *Leges posteriores, priores* CONTRARIAS *abrogant.* It is

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not enough that the latter statute be different in its matter, it must be contrary.

The statute of 33 *H.* 8, 3, provided, that any examined before the king's counsel, who confesses treason, shall be tried in the county where the king pleases, and it was held to be repealed by that of 2 *Ph.* and *M.*, which directs that all trials for treason, shall be according to the common law. 11 *Co.* 63, *a.* The reason is apparent; for the latter statute directed that all trials for treason, which include those of persons mentioned in the statute of *Hen.* 8. should be in the course pointed out by the common law, and this was contrary to the provision of the statute of *H.* 8.

A statute is also said to repeal a former one, where it enacts a thing inconsistent with it.

So the statute of 1 *Ed.* 6, 2, which provided, that "process shall be in the king's name," was held to have been repealed by that of 1 and 2 *Ph.* and *M.* 2, which provides, that "all ecclesiastical jurisdiction of bishops, &c. shall be in the same estate as to process, as it was in the time of *H.* 8." For the two provisions were inconsistent. 12 *Co.* 8.

But though the provision of the latter statute be different, if they be neither contra-

ry nor inconsistent, the former statute is not repealed.

As if by a statute, an offence be made indictable at the quarter sessions, and a subsequent one makes the same offence indictable at the assizes, the former statute is not repealed; because the provisions of the latter are neither inconsistent, nor contrary with those of the former. Both statutes then may, and ought to stand in force, and the quarter sessions and the assizes shall have concurrent jurisdiction. 1 *Bl.* 89, 90.

And if the two statutes may be reconciled together, the former shall not be held to be repealed.

So the statute of 16 *R.* 2, 5, providing that a person attainted on a *premunire* shall forfeit *all* his land, was held not to repeal the statute *de donis* as to land in tail, against the issue in tail. 11 *Co.* 636.

The statute of 5 *El.* 4, which provided that none should use a trade, without being an apprentice, was held not to repeal the 4 and 5 *Ph.* and *M.* which directed that no weaver use, &c. 6 *Co.* 196.

The statute of *P.* and *M.* directed the forfeiture of any woollen cloth or kersies, wove

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by any person not an apprentice, or not having exercised the trade for seven years. That of *Elizabeth* repealed "all the statutes, heretofore made, and every branch of them, as touch or concern the hiring, keeping, depending, working, wages or order of servants, workmen, artificers, apprentices and labourers, or any of them, and the penalties, and forfeitures concerning the same, shall be, &c. repealed, utterly void, and of none effect."

Yet *Cogeril*, having had judgment for a forfeiture, under the statute of *P.* and *M.*, *Plashfield*, the defendant, brought a writ of error to reverse it, on the ground, among others, that the statute relied on was repealed by that of *Elizabeth; sed non allocatur.* For, looking into the statutes, they may stand together; and it was said that a latter statute in the affirmative, shall not take away a former act, and the rather, if the former be particular, and the latter general. *Griffin's* case. 6 *Co. Ne.*

This case places the rule (that where the legislative will has once been expressed, its binding force shall continue till it be unequivocally recalled) in the clearest point of view. For, in the preamble of the latter statute, the intention of parliament is formally expressed,

that "the substance of as many of the said laws (the former) as are meet to be continued, shall be digested and reduced into one sole law and statute." "Clothiers, woollen-cloth weavers, cloth-workers, are mentioned as tradesmen, who are the particular objects of the statute.

In the criminal law, where the utmost rigour prevails against the extension of offences, and punishment is so strictly guarded against, (we find it established by numerous decisions) that a positive statute does not repeal the common law, and the state prosecutes either on the statute, or at common law.

The 19th section of the first judicial act of 1813, provides, that the superior courts shall have authority "to punish all contempts by fine, not exceeding fifty dollars for each offence, and also by imprisonment not exceeding ten days."

Now, here are no negative words. The substance of the new act may well stand with that of the *Partida*. The two provisions are not contradictory, and may fairly exist together.

The above provision is literally copied from the 17th section of the act of 1805, chap-

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ter 26, 2 *Martin's Digest*, 116, which gave authority to the superior court of the late territory of Orleans, to punish contempts. Yet that court did not think, that the authority given them by that act, deprived them of the power of striking off attornies from the roll, much less of suspending them. See judgments of that court, 1808, 1812, and 1 *Martin*, 129. 2 *id.* 305.

Judge Moreau and Mr. Carleton, the two gentlemen, who under an act of the legislature, have lately published, *The laws of las Siete Partidas, which are still in force*, in the state of Louisiana, have preserved the laws of the third *Partida*, under consideration, as unrepealed by any law of the state.

Indeed, who can say that a Spanish judge would consider as incompatible, the authority given him by the third *Partida*, to suspend a lawyer who indulged himself with indecorous language towards him, and that of sending to prison any other individual taking the same liberty.

The judges of England do not think their power of punishing contempts of their authority, by fine and imprisonment, incompatible with that of punishing by a suspension, such

attornies as are not restrained by a sense of duty, from the indulgence of angry passions in the exercise of their functions, in the presence of a court.

In what state of this union are the two powers considered as incompatible?

That nothing was said of the law of the *Recopilacion de Castilla*, which forbids judges to live with any advocate or notary—it not being easy to discover in it any bearing upon the question under consideration.

That, upon the whole, after a most minute investigation of the reasons adduced by the counsel, nothing was discovered in them that gave rise to the least doubt, and consequently no rehearing ought to be granted.

MATHEWS, J. said that he assumed it, as incontrovertibly true, that according to the Spanish laws, an advocate may be punished by suspending him from the exercise of his profession, before a court which he has offended by arrogant and contemptuous behaviour. And that these laws (so far as they are not repealed by the legislative authority of the late territorial and the present state government) establish rules of proceeding in

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all cases similar to that of the present. In opposition to the correctness and legality of our proceedings against the offender in this case, it is contended, that the laws of Spain, on the subject, are virtually repealed by the 17th section of the judiciary act of 1813, in which it is declared, that "the supreme court shall have power to punish all contempts by fine, not exceeding fifty dollars for each offence, and also by imprisonment, not exceeding ten days." To ascertain whether this provision of the act abrogates and repeals all former laws authorising punishment for contempts, it is necessary to resort to known and established rules of abrogation and repeal. The first is, that old laws are abrogated and repealed by those which are posterior, only when the latter are couched in negative terms, or are so clearly repugnant to the former, as to imply a negative. Second, a particular law is not repealed by a subsequent general law, unless there be such repugnancy between them, that they cannot both be complied with, under any circumstances. Thirdly, if many laws be made on the same subject, which are not repugnant in their provisions, they ought to be considered as one law and so construed.

The slightest application of these rules, to the case under consideration, will shew most evidently, that the Spanish laws, which relate to the deportment and government of advocates, are not repealed by the act of the legislature relied on as having produced this effect. So far as it relates to punishment for contempts, it is not couched in negative terms, nor is the matter contained in it, so repugnant to former laws, as to imply a negative.—The law which forms the rules of conduct for advocates, and provides the necessary sanctions for keeping them orderly and decorous, and preventing insults and contumely to courts of justice, is particular, being limited to a certain class of citizens; the section of the act cited, is general, and relating to all persons, and the provisions of both may be easily complied with. Considered as one law, providing for different things, there is clearly no repugnancy between the special and general inactment, and each ought to have its due effect.

Is it not a sound legal axiom that there can be but one kind of punishment, for one and the same offence? Contempts committed by persons who do not stand in any particular relation to the court, may be punished by

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fine or imprisonment, or by both fine and imprisonment. An officer, such as an attorney and counsellor, is punishable by suspension, from the exercise of the functions of his office, in the court which he has offended by arrogance and contempt; and when the offence, as in the present case, has been committed, under colour of his profession, I think it most proper, that he should be punished in relation to his office.

As the judgment is not complained against on account of the severity of the punishment, it is useless to express any opinion on that matter.

LECESNE vs. *COTTIN*.

An appeal lies from the discharge of a rule on the sheriff, to shew cause why he does not release attached property.

The garnishee has a right to retain funds attached in his hands, though he did not expressly admit his having any—having neglected to answer.

APPEAL from the court of the first district.

MARTIN, J. This case was before us last spring, and remanded to the district court. 9 *Martin*, 424. Soon after its return there, the defendant's counsel suggested, that the sheriff had, at the defendant's request, been furnished with an alias attachment; and a bond, with sufficient sureties for the performance of the judgment, having been tendered him, he had

refused to release the attachment, whereon a rule was obtained, that the sheriff shew cause why he refuses to release, according to the 11th sec. of the act of 1805, and the 3d of that of Jan. 28, 1817.

After argument, the rule was discharged; the court being of opinion that there was no specific property attached, susceptible of being delivered on bond: nothing being attached but rights and credits, which, in their nature, are untangible, and therefore not susceptible of being bonded. From this decision the defendant appealed.

The plaintiff and appellee contends:—

1. That the decision is not such as is appealable from, and relies on the 11th sec. of the act organising the supreme court. *Part.* 3, 23, 13. *Fortier* vs. *Brognier.* 3 *Martin*, 17. *Chedoteau's heir* vs. *Dominguez.* 7 *id.* 521.

2. That if an appeal lies, the decision is correct, the garnishee, though interrogated on oath, having made no declaration of any money due by him.

The defendant and appellant urges, that a defendant is entitled, at any time before trial, to a release, and to the discharge of the gar-

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nishee, by giving bond. 1 *Martin's Digest*, 516, which cannot be procured without a lien attachment.

I. The injury which a defendant in attachment sustains when his funds are wrongfully withheld from him, especially when a suit is continued till evidence comes from Europe, may occasion his ruin, and is, in my opinion, a grievance irreparable; and I think an appeal ought to lie in such a case.

II. The garnishee having failed to answer, admitted he had funds of the defendant, sufficient to cover the plaintiff's claim; this entitled him to keep so much from the defendant, till the latter released him from his liability, by giving bond to the sheriff, and the circumstance of the property attached, being rights and credits untangible, as the judge *a quo* says, does not prevent the release of the garnishee. Funds, in the hands of a third person, are as useful to the owner as any kind of tangible property, and he ought not to be restrained from the use of them, where he tenders that security, on the giving of which, the law has provided, that attached property shall be released.

I therefore think, that we ought to reverse the judgment of the district court; reinstate the rule discharged; and remand the case, with directions to the judge, to proceed thereon according to law.

MATHEWS, J. A defendant in attachment, has a right to obtain a release of his property which may have been seized, by giving bond to the sheriff, with sufficient surety to defend the suit and abide the judgment of the court. 1 *Martin's Dig.* 516. This release may be required at any time before trial, and if refused, may work an irreparable injury to the defendant, by depriving him of the use of his property and funds. It is true, I believe, that the sheriff must judge of the sufficiency of the security of funds, and take it at his peril, as in case of bail. In the one case, the person of the defendant is discharged from custody, and in the other, his property is released from seizure: and whether the attachment be executed by a real levy on property, or by stopping the funds of the defendant in the hands of his debtor, I can see no good reason why the latter should not be released, so as to allow them to be recovered and used by the owner,

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in the same manner as he would be authorised to take and dispose of his property, on giving surety, as required by law. I therefore concur in the opinion delivered by judge Martin, being satisfied with the reasons on which it is founded.

It is therefore ordered, adjudged and decreed, that the judgment be annulled, avoided and reversed; the discharged rule reinstated, and the case remanded, with directions to the judge to proceed thereon according to law.

Moreau for the plaintiff, *Seghers* for the defendant.

SHAUMBURG vs. *TORRY & AL. SYNDICS.*

If the defendant cede his goods before a judgment against him be signed, the syndics must be brought in.

APPEAL from the court of the first district.

MARTIN, J. On the 8th of June, 1820, the plaintiff obtained judgment against the present insolvents, who, on the 12th, presented their petition for a surrender of their property to their creditors, and obtained a stay of all proceedings against them. Afterwards the judgment was signed and recorded.

The plaintiff was ordered to be placed as a creditor on the tableau of distribution, as a

judgment, and consequently, mortgage creditor of the insolvents. The syndics appealed.

They contend, and I think justly, that at the time of the surrender, and order of stay of proceedings, there was not any complete judgment against the insolvents; that the syndics had a right to be heard against the judgment given, and be allowed to shew, that it ought not to have been signed; and when it was completed by the signature of the judge, the present insolvents had begun to have the ability of standing in suit as parties, and therefore, the plaintiff, who was not a judgment creditor, at the time of the surrender, could not have become so, except on a call of the syndics into court. 3 *Martin*, 204.

I think the district court erred, and that we ought to reverse the judgment, and order, that the plaintiff be placed on the tableau as a simple creditor, and that he ought to pay costs in both courts.

MATHEWS, J. The judgment obtained by Shaumburg being incomplete, for want of the judge's signature, at the period of the *cessio bonorum* by the insolvents, gave him no benefit as a mortgage creditor, and cannot alter his

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situation in relation to other creditors, whose credits were equal to his at the time of commencing suit.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that the plaintiff be placed on the tableau of distribution, as a simple creditor, and that he pay costs in both courts.

Hoffman for plaintiff, *Eustis* for defendants.

LABARRE vs. *DURNFORD.*

The sealing or formal delivery of a bond is not required by our law.

There is no need of the prayer for bail in the petition.

APPEAL from the court of the first district.

MARTIN, J. This case was lately before us, 9 *Martin*, 381, and was remanded for a new trial. It is an application for judgment against bail, on notice. The defendant, in his answer, denied that he sealed and delivered the bond; averred that no bail was prayed for; that the sheriff was not authorised by law to take or demand any, neither did he take any bond in the legal form: farther, that the original defendant, J. or Jacob Fry, was never arrested by the sheriff; that all the proceedings were irregular, nor was any judgment ren-

dered on said suit, nor was any legal writ of *ca. sa.* or *fi. fa.* issued; that admitting the defendant became bail, he is not bound to pay any money whatever; that Fry, the original defendant, is dead.

The following facts were found by a jury—

The defendant did not put any seal of wax to the bail bond. Instead of a seal, are the letters, L. S. There is no other seal. There is no proof of Fry's death.

There was judgment for the plaintiff, and the defendant appealed.

The defendant assigned as errors, apparent on the record, that no proof was given of the assignment of the bond by the sheriff, and that the *fi. fa.* issued four days after the judgment.

1. The sealing, or formal delivery of a bond or obligation, is not required by any law of the state.

2. Nothing renders it necessary, that the plaintiff should pray for bail in the petition, nor that his attorney should require the sheriff to demand it. The officer must, himself, require it, in cases in which it is by law to be taken.

3. A bail bond in the regular form appears, and the sheriff's deputy has sworn that J. Fry was arrested.

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4. We find on the record, regular proceedings to judgment, and a *fi. fa.* and *ca. sa.*

5. We have lately decided, that the signature of the sheriff to a bail bond, is a matter of record, and need not be proven.

6. I do not know that any thing prevents the execution from issuing till ten days after the judgment is signed; though the party may appeal and stay it. In such a case, it would be staid in the sheriff's hands.

I think the judgment ought to be affirmed with costs.

MATHEWS, J. I concur in this opinion.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Workman for the plaintiff, *Hennen* for the defendant.

SEGHERS vs. *HANNA'S SYNDICS.*

Former judgment amended.

MARTIN, J. We have granted a rehearing to the plaintiff, who suggests, that the court overlooked a clause in the agreement on which his claim is grounded, making its effects to depend

on the approbation of the parish court. An approbation which it was the primary object of the rule to obtain; and it is urged, that if we do not think that the parish judge erred in refusing to approve the agreement, we ought to have directed a judgment of non-suit to be entered. *Ante*, 54.

Whatever may have been the intention of the plaintiff in obtaining the rule, the apparent object of it was to obtain an order for the payment of the specific sum claimed; the syndics do not appear to have been willing to take on themselves, absolutely, to fix the plaintiff's compensation, and were willing to submit to the decision of the court, if the time of payment was extended, but an approbation of the compensation by the court, they did require.

The parish judge does not appear to me to have considered the case as standing before him, as one in which he was to enquire into the value of the services and ascertain the compensation due, but one in which a specific claim was made. It does not appear to me that he erred; and the only modification that we can make to our judgment, and which we should do, is to reserve to the plaintiff his

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right to have his services enquired into, and and a compensation made therefor, according to law. The judgment must therefore be reversed, and ours a judgment of non-suit; the costs of appeal to be borne by the estate.

MATHEWS, J. I concur in the opinion for the reasons adduced.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and that there be judgment of non-suit; the costs of the appeal be borne by the estate.

Seghers for plaintiff, *Denis* for defendants.

DUNBAR vs. *NICHOLS.*

A party who relies on prescription must plead it.

The want of a plea of this kind cannot be supplied *ex officio* by the court.

APPEAL from the court of the first district.

MARTIN, J. The plaintiff demands the rescission of the sale of a slave he bought from the defendant, on account of her having been attacked with an incurable disease, at the time of the sale. She being dead since, the defendant pleaded the general issue only.—There was a verdict and judgment for him, and the plaintiff appealed.

Our attention is first arrested by a bill of exceptions, to a part of the judge's charge, in which he said, that "in the opinion of the court the plaintiff was not founded in his right of action, not having filed his petition within six months after the discovery of the disease."

The law has provided defendants with the plea of prescription, that they may use it as a shield, to protect themselves against unjust claims, not to use it as a weapon to destroy just rights. The party who uses it in an unrighteous case sins greviously, and the court neither can or ought to supply the want of it, *ex officio*. When the plea is not made, the presumption is, that the defendant thinks it would not avail him at all, and that he cannot righteously avail himself of it.

The district court, in my opinion, erred in directing the jury to disregard the plaintiff's right, on the ground that it was exercised too late, and I think the judgment ought to be reversed.

Proceeding then to discover what judgment ought to have been given below, I find the evidence contained in two depositions; after the proof of the execution of the bill of sale.

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Dr. Smith deposes, that in the summer of 1818, he thinks in August, he examined the slave, and told the plaintiff he could neither cure nor relieve her. The ailment appeared to be an enlargement of the mesenterie gland, of long standing. The plaintiff desired him to attend her as well as he could, and if she died, to open and examine her. She died soon after, and on opening the body he found the mesenterie gland in a scirrhous state, and very much enlarged; it formed a solid tumour about six inches long, and at least three quarters of an inch in diameter.— The uterus was diseased and contracted. He is satisfied the malady must have existed six months before her death. From his own view, and the declarations of the slave, he thinks it must have existed two years.

Cobler deposed, that the wench was brought to the defendant's plantation, in the latter part of February, 1818, and was there about two months. About the first of March, the plaintiff came there and bought a negro man, whose wife was desirous of going with him. She was sick in the house, when her husband was bought. The plaintiff afterwards bought her, when she was working in the field; the wit-

ness understood the plaintiff did not buy her at first, on account of her sickness. The witness is not a physician, and cannot tell whether the disease be curable or incurable. She worked two days on the defendant's plantation. She complained of a dysentry, which he does not think incurable, and he thinks she was well cured when the plaintiff bought her.

The bill of sale bears date of April 24th, 1818.

Admitting there cannot be any doubt that the slave died of a disease incurable, in the month of August, 1818; and that the disease existed at the time of sale, whether it might not have yielded to the healing art, if medical aid had been procured in the months of May, June and July, is a question not easy for us to solve. A jury was prayed for below, who, the presumption is, found for the defendant, on the charge of the court, that the prescription availed. We cannot say, however, that they did not attend to the merits of the case, and in such a circumstance, we would not easily distrust their verdict.

I conclude, that the case ought to be reman-

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ded for a new trial, with directions to the judge, not to give the part of the charge excepted to; the costs of this appeal to be borne by the defendant and appellee.

MATHEWS, J. I concur in this opinion.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled and reversed; and that the cause be remanded, with directions to the judge not to give the part of the charge excepted to.

Livingston for the plaintiff, *Duncan* and *Conrad* for the defendant.

FREDERIC vs. *FREDERIC.*

Widows have a right to mourning dresses out of succession of their deceased husband.

Married persons cannot, during marriage make to each other, by an act *inter vivos* or *mortis causa*, any mutual or reciprocal donation.

When there is no contract of marriage, the child of a slave belonging to the

APPEAL from the court of the parish and city of New-Orleans.

MARTIN, J. The plaintiff states, that in the year 1805, she was married to the defendant's son, to whom she brought $8599, in money or credits, cattle, and furniture; that she then possessed a negro woman, who has since had a child, now eight years of age; and during her marriage, a brother of her's, gave her four cows and two heifers; that at her marriage, the defendant's son had

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only a lot in the suburb St. Mary, worth $350, on which he afterwards erected several buildings, with monies which the plaintiff had at interest, and he collected. That she became a widow in 1820, and on the 12th day after, had an inventory made of the common property in the parish of St. Charles, and soon after, of that in the parish of Orleans. That on the 17th of August, 1809, her husband and herself, made a mutual donation to the survivor of them, of the usufruct of all the property which should be in their possession, at the time of the death of the party dying first.

wife, is paraphernal.

Wife has not a right to interest on paraphernal property during the year of mourning.

The petition concluded, that the plaintiff might be allowed to retain the negro woman and child, four cows, and two heifers, above mentioned, erroneously included in the inventory of the common estate, her *armorie* bed, bedding, and wearing apparel. That out of the sale of the common property, she may be allowed $8599, the amount of her matrimonial rights, with interest from the 19th of July last; $100 for mourning dresses; $2 per day for the keeping of the property of the community, and that the balance, after the payment of the debts of the community, be divided between her and the defendant; and that the furniture

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of the community be given her, at the price of the estimation.

The defendant pleaded the general issue, and the nullity of the donation.

The judgment allows to the plaintiff the usufruct of the common property, possessed at the death of the husband, and the negro woman, whose child is declared to be common property, or *acquet;* the cows and heifers, and wearing apparel; $100 for mourning dresses; $8599 for her matrimonial rights; and the surplus to be equally devided, each party paying their own costs.

From this judgment, the defendant appealed, generally, and the plaintiff from so much of it as decrees, that the child of the negro woman was *acquet;* and also on account of no interest being allowed her for her dotal rights, at least from her husband's death.

At the hearing in this court, the defendant's counsel confined his objections to the judgment of the district court—

1. To a sum of $818 33 cents, which he urges, was improperly allowed for interest.

2. To that of $620, allowed for the price of 31 head of cattle, which he thinks excessive.

3. To the allowance for mourning dresses,

which he insists ought not to have been made, the plaintiff being much richer than the deceased; and if made at all, ought to be reduced.

4. To the admission of the donation as a valid one.

I. It does not appear to me, that there is sufficient evidence on the record, to justify the allowance of $813 claimed for interest.

II. By consent of counsel, the sum of $600, allowed by the court *a quo*, for the cattle is reduced to $372.

III. The allowance for mourning dress, does not appear to me extravagant. Widows are to be supplied with habitation and mourning dresses out of the succession. *Civ. Code*, 332, *art.* 52. *id.* 340, 83. *Febrero addicionada*, 2, 1, 7, *sec.* 3, *n.* 53, and no distinction is to be made between widows richer than the husband and others.

IV. The donation was absolutely void. "Married persons cannot, during marriage, make to each other, by an act *inter vivos*, or *mortis causa*, any mutual or reciprocal donation, by one and the same act." *Civ. Code*,

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258, *art.* 225. It is not contended, that the donation in the present case, is not exactly such a one as is described in the above article, but it is urged, that the article is not a prohibiting one, and therefore does not import a nullity, as none is expressed. *Id.* 4, *art.* 12. I do not see how it could be possible to say, that what the law has said must not be done, can be valid.

1. The plaintiff complains, that the negro child was improperly considered as an *acquet.*

2. That no interest was allowed on her dotal right.

I. To shew that the child was not *acquet*, the plaintiff's counsel has cited, *Part.* 4, 11, 20, and *Civ. Code*, 332, *art.* 50.

There was not any matrimonial convention between the parties; hence there was no dot or dowry, and all the wife's property was paraphernal. The child issued from a paraphernal slave, follows the condition of the mother, and as such is paraphernal.

II. Interest is claimed under the *Civ. Code*, 332, *art.* 52, where it is shewn, that the widow has her choice, either to claim the interest of her dowry, during the year of mourning, or to claim a sustenance out of the succession of

her husband. This does not shew that she has a right to interest on the proceeds of her paraphernal property, in the hands of her husband's representatives.

I think the parish judge erred in allowing to the plaintiff the sum of $818 33 cents, in the allowance for cattle, which is too high in supporting the donation, and in considering the negro child as an *acquet;* that consequently, we ought to reverse the judgment, and ours ought to be—

That the dotal rights be recovered without interest; that the allowance for the cattle be reduced to $372; and that the allowance for mourning dresses be confirmed.

MATHEWS, J. I concur in this opinion.

It is therefore ordered, adjudged and decreed, that the judgment ought to be annulled, avoided and reversed, and that the plaintiff recover her dotal rights with interest, the sum of one hundred dollars for her mourning, and that of three hundred and seventy-two dollars for the cattle.

Moreau for the plaintiff, *Morel* for the defendant.

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Wood & al. *vs.* Fitz.

WOOD & AL. vs. *FITZ.*

The plaintiff may sue the surety on a prison bounds bond, without the principal, and before judgment against the latter.

The condition of the bond needs not be literally that on the statute.

The party cannot object that he was in custody when he signed such a bond.

The signature of an officer on a bond which he is bound to take by law proves itself.

APPEAL from the court of the first district.

This case was determined in July, 1820, but the judgment was suspended, on a motion for a rehearing, which finally prevailed. The first judgment is as follows:—

MARTIN, J. delivered the opinion of the court.* The defendant, being sued on a prison bound bond, executed by him as surety for A. Elliot, pleaded—

1. That the principal ought to have been sued with him.

2. That the plaintiffs ought first to have obtained judgment against the principal.

3. That the bond was not taken in pursuance of the statute.

4. That the bond was given without any legal consideration, while the defendant was in duress and in illegal confinement.

The defendant further denied all the facts alleged in the petition.

There was judgment for the plaintiffs, the court *a quo* being satisfied with the testimony taken in the case. The defendant appealed.

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* MATHEWS, J. did not sit in this case at the first hearing.

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The statement of facts shew, that Elliot was arrested on a *ca. sa.*, issued on a judgment obtained by the plaintiffs against him, and whilst at the sheriff's office, and in his custody, executed the bond, with the defendant, for the purpose of obtaining the benefit of the prison bounds; that he was not committed to prison; and shortly after executing the bond, left the bounds, without the consent of the plaintiffs, and without satisfying them.

Neither the plaintiffs nor their agent paid, or offered to pay, or advance the allowance required by law for the debtor's sustenance. Elliot, on being arrested on the *ca. sa.*, was carried to prison, but the key was not turned on him. While there, he executed the bond.

The defendant having executed a bond, jointly and severally, with the principal, is suable without him; and we do not know any reason why a previous judgment against the latter should be required.

The bond appears to us taken in pursuance of the statute. The form of the bond to be given is not prescribed by law. It is provided, that the condition be, "not to break or depart therefrom, (the bounds) without the leave of the court, or being released by order

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of the plaintiff, at whose suit he (the debtor) is confined." The condition of the bond in suit is, that the debtor "shall remain within the boundaries of the public prison, &c. until he may be duly discharged therefrom, by order of court, or otherwise, in due course of law." We are of opinion, that the spirit of the law is complied with, and the words used, convey the same idea, though they be not literally those of the statute.

The bond had a legal consideration;—the exemption it procured to the debtor from being locked up within the jail.

The violence which avoids a convention, must be an illegal one. *Pothier's Obligations.* The sheriff having arrested the debtor on a *ca. sa.*, was bound to detain him till he was delivered to the jailor, or admitted to the bounds, after giving bond.

But it is contended, that the detention was illegal, because the creditor had not made the advance which was prescribed by the act, approved on the 17th of February, 1817.

It is far from being clear, that debtors, not confined within the walls of the prison, are entitled to the allowance.

The act provides, that "no person shall be

kept in confinement at the suit of any creditor, in this state, unless the said creditor pays to the keeper of the jail, a sum of three dollars and fifty cents a week, to be paid in advance, by the said creditor, to the keeper of the jail, when he, the said debtor, is committed, for the use of said debtor; and in case the said creditor should fail to pay the said sum, then the said debtor may be set at liberty.

The allowance is to be paid to the keeper of the jail, where the debtor is committed. It must suffice then, to pay after, or at least when the debtor is committed to the keeper of the jail: The consequence of the failure of payment, is that the debtor may be set at liberty.

The sheriff cannot refuse to arrest the party against whom a *ca. sa.* is in his hands, because the allowance is not paid, nor to commit him to the keeper of the jail. For till then, there is not any keeper of the jail to which the debtor is committed; and until after confinement, there is no failure in the creditor; because it is not certain that there will be an arrest and commitment. The arrest and detention of Elliot was not illegal, because the allowance was not paid. Before the commitment, ac-

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cording to the statement of facts, Elliot asked to be admitted to the prison bounds, and executed a bond therefor. There was no commitment to jail. No illegal violence was exercised against Elliot.

If the defendant intended to avail himself of the want of payment of Elliot's allowance to justify his departure from the bounds, on the ground that he might set himself at liberty, this ought to have been pleaded.

All that the plaintiffs may be required to prove is, that the bond was legally taken, and the condition of it broken. This clearly appears from the record.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

After the rehearing, the following judgment was given :—

MARTIN, J. A rehearing was granted, on the defendant having drawn our attention to the absence of any evidence of the bail bond having been assigned by the sheriff. On a suggestion of a diminution of the record, a writ of *certiorari* issued, and the copy of the assignment of the bail bond came up. The de-

fendant now alleges, that no proof was exhibited below, of the signature of the sheriff at the foot of the assignment.

I think that the bonds taken by the officers of the court, in pursuance to law, are matters of record, when put on the files of the court, and need no proof of the officer's signature.

I think the former judgment ought not to be disturbed, but be certified to the district court.

Mathews, J. I concur in the opinion.

It is therefore ordered, adjudged and decreed, that the judgment formerly pronounced in this case remain untouched.

Preston for the plaintiffs, *Morse* for the defendant.

DAY vs. *BOOKTER.*

Appeal from the court of the third district.

Damages allowed for a frivolous appeal.

Martin, J. This is an action on two promissory notes; the defendant pleaded the general issue; the notes were duly proven, and the defendant offered no testimony; there was judgment for the plaintiff; the defendant appealed; brought up the record, but no

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counsel appeared in his behalf. The case has been heard *ex-parte*, and it clearly results, that delay was the only object of the defendant in appealing; the plaintiff and appellee has prayed for the damages, which we are by law authorised to grant.

I think, that we ought to affirm the judgment of the district court, and allow ten per cent to the plaintiff and appellee, on the amount of the judgment, for the damage he has sustained by the frivolous appeal of the defendant, with costs of suit in both courts.

MATHEWS, J. This appeal was evidently taken for delay only, and in affirming the judgment of the court *a quo*, damages ought to be allowed to the appellee.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed, and that the plaintiff and appellee recover, in addition to the judgment, ten per cent thereon, for the damages he has sustained by the wrongful appeal of the defendant.

Preston for the plaintiff.

Former judgment confirmed.

ST. ROMES vs. *PORE.*

On an application for a rehearing, in this case, which was determined in May last, *ante* 30, it was urged, that—

Any kind of defect in the thing sold, is not a ground for the action of redhibition; such defects alone are considered as render the thing absolutely unfit for the purpose for which it was intended in commerce, or such as so far diminish its utility, or render it so inconvenient, that it is presumable, that if these defects had been known to the buyer, he would not have bought at all, or would have bought at a reduced price. *Civil Code*, 356, *art.* 67.

The seller is not accountable for the apparent defects or vices which the buyer could have seen himself; as for example, if a horse had lost his eyes, the buyer cannot complain of a defect, of which he is ignorant, only through his own fault, any more than those the seller may have declared to him. *Id. art.* 69. *Vigilantibus non dormientibus leges subserviunt.*

The redhibitory defects, owing to the sickness or infirmities of slaves, consist principally in the three following diseases, *viz.* leprosy,

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madness and epilepsy. With regard to other ailments or infirmities, with which slaves may be attacked, they form or constitute redhibitory defects, only when they are incurable by their nature. So that the slave subject thereto, is absolutely unfit for the services for which he is destined, or that his services are so difficult, inconvenient or interrupted, that it is presumed, that the buyer would not have bought him at all, if he had been acquainted with the defects, or that he would not have given so high a price, had he known that the slave was subject to that sickness. *Id.* 358, *art.* 80.

According to this part of the law, which being clear and free from ambiguity, the judges are forbidden to disregard the letter, under the pretence of pursuing its spirit. (*Id.* 5, *art.* 13,) any infirmity, other than one of the three mentioned, in order to constitute a redhibitory defect, must be incurable in its nature, and render the slave absolutely unfit for the services for which it is destined; or at least render those services so inconvenient, difficult and interrupted, that it is to be presumed, that if the buyer had been acquainted with these defects, he would not have bought at all, or at least, not for the price given.

The testimony of Dr. Dupuy shews that the infirmity of the slave must have been apparent at the time of the sale; but we have a better proof of this. The plaintiff himself admits in his answer to our interrogatory, that he knew the infirmity of the slave before he signed the act of sale. So that, it cannot be presumed, that he would not have bought her had he known the infirmity. The obligation of the seller to declare the defects of the thing sold, does not hold true; because the defect was apparent, and the purchaser knew the infirmity. *Scientia utriusque par pares facit contrahentes.*

An infirmity is incurable either by its nature or by the progress it has made, or by the ignorance of the physician. When an infirmity results from the injury of one of the organs necessary to life, as the brain, the heart, or the lungs, it is, and will always be, incurable by its nature. It is also said, though not very correctly, to be incurable by its nature, when the healing art has no remedy to cure it; as the yellow fever, the bite of a rattle-snake in one of the arteries, the hydrophobia, or *rabies canina*, &c., which one day may cease to be incurable. When an infirmity,

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curable by its nature, has been neglected or ill-treated in its beginning, it reaches a stage where it ceases to be curable, and is said to be incurable by the progress it has made. When the infirmity is such that the physician called to heal it, is ignorant of the means of cure, it is said to be incurable by the ignorance of the physician.

Out of these three classes of incurable infirmities, the law gives the redhibitory action, in the case of those which are incurable by their nature. Indeed all infirmities, incurable by their nature, do not give rise to the redhibitory action. The infirmity must be such as to render the slave absolutely unfit for the service, &c.

The only proof adduced by the plaintiff is, that on the 17th of May, eight days after the sale, he had the slave examined by Dr. Dupuy, to whom she appeared very sick, and who supposed her to be incurable, but the doctor is neither positive as to the incurability of the disease, nor explicit as to the causes of it. Admitting that he was, does it follow that the disease was incurable, on the day of the sale, eight days before? One might as well conclude, that, because a disease was incur-

able on the last day of December, it was so on the first of January. Without having studied either Hypocrates or Celsus, every one who has the use of his reason, knows that there are diseases so rapid in their progress, that they become incurable in one day, one hour; nay, in one minute.

To say that the redhibitory action is taken from the buyer, only when he knows the nature of the disease, *i. e.* that it is incurable, is a cavil. The nature of a thing is what constitutes it what it is. *Rerum natura illa est, quâ res quæque consistunt.*

The nature of things is known only to the supreme maker of them. The only thing, the knowlege of which we, ignorant men, are by our limited nature, permitted to attain, is the effect produced by the nature of things. We are all ignorant of the nature of fire, but we know it is warm by its nature. We are ignorant of the nature of matter, but we know it is indestructible by its nature. We are all ignorant of the nature of infirmities, but we know that some of them are incurable by their nature. To say that the nature of fire is warm, that of matter indestructible, that of an infirmity incurable; is to say what consti-

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tutes fire to be warm, is warm, what constitutes matter to be matter, is indestructible; or what constitutes an incurable infirmity, to be incurable, is incurable, is nonsense, because it is giving attributes to *entes rationis.*

An infirmity, incurable in is nature, is one which, in consequence of what constitutes it what it is (which we have agreed to call its nature) admits of no cure. If the intention of the legislature had been to give the redhibitory action to a purchaser, for all incurable infirmities, certainly it would not have made use of the words, *incurable by their nature.* If the maxim *inclusio unius est exclusio alterius* be correct, it is clear, by the words of the statute, that the redhibitory action is given only for infirmities incurable by their nature. Very little reflection will be needed to satisfy us, that the action is not given in cases of infirmities, incurable by the ignorance of the physician, or by their progress.

In the first case, it would be unjust to let the seller suffer, in consequence of the error of a man whom he had not chosen.—*Factum suum cuique, non adversario, nocere debet. De reg, jur.* 155. In the second, it must be apparent, from the nature of things, that the buy-

er may perceive the infirmity, and if he purchase, notwithstanding this, *volenti non fit injuria.*

Certainly, if the plaintiff, endowed with the faculty of penetrating into the mysteries of nature, had seen that the slave's disease was incurable, or would terminate fatally, no one can believe that he would have bought.

But, *spei emptio est, ff. de contr. empt. C.* 8. When a man buys the casting of a fisherman's net, who is silly enough to think the bargain would have been made, if the buyer had known that no fish would be caught. He bought with the hope of fish being caught. So he, the plaintiff, bought for $500, the hope of curing a slave, who one month before, had been sold for $900. That he bought such an hope is proven, by his placing the slave under the care of a physician, and having her nursed for a month, although he was informed the disease was incurable, his making no claim, and neglecting all means of preserving his pretended right till his hope had entirely vanished.

The plaintiff, as is often the case with the purchaser of the casting of a net, has been disappointed, yet he must pay, *veluti cum jactum*

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retis a piscatore eminus, aut indaginem plagis positis á venatore, vel pantheram ab aucupe: nam etiamsi nihil capit, nihilominus emptor pretium præstare necesse habebit. ff. l. 11, *in fine de actionibus empti et venditi.*

Another reflection will suffice to refute the idea that the parties contemplated that the vendee's claim would depend on the issue of the disease. Any one, even the least acquainted with the human heart, knows, that every one, however unfit he may be for the purpose, is more willing to trust his own concerns to himself, than others. Can it be believed that the defendant, selling for $500, a slave, who a little before had cost him $900, intended to trust his cure to the plaintiff, a bachelor, unacquainted with the healing art, in the expectation, that in case of his cure, the benefit would result to the purchaser, and in case of a fatal termination, the loss would be the seller's.

The infirmity was apparent and known to the purchaser. It was not incurable either in its nature, nor by its progress, at the time of sale. At least no proof is administered of such incurability; none certainly results from the death of the slave. Every treatise of logic warns us against the sophism, under the title

non causa pro causâ; such a reasoning reduced to its simplest expression, being *post hoc, ergo propter hoc*, which is absurd.

Martin, J. observed, that the defendant suggested, that the court erred in affirming the judgment of the parish court, because the disease was not incurable in its nature, and did not render the slave absolutely unfit for the service for which she was intended; nor render her services so inconvenient, difficult and interrupted, that it may be presumed, that if the buyer had been acquainted with the disease, he would not have bought her at all, or would not have given so high a price. *Civ. Code*, 356, *art.* 67, 69, *id.* 358, *art.* 80.

That the counsel seemed to believe, that it is necessary, that all these circumstances should occur, and that a disease incurable in its nature, is not *per se* a redhibitory one: that the absolute unfitness of the slave, for the services for which she was destined, &c. must be also shewn to exist.

That he could not see how it can be doubted, that the sole circumstance of a slave being attacked with a disease, which the medical

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art cannot cure, and must shortly terminate fatally, is a redhibitory one.

That the chief enquiry is, what was the disease of the slave in the present case?

That the disease was so, when Dr. Dupuy was called, cannot be doubted. He swears, he thought her incurable. On the second day she appeared in a state of complete *marasme*, with all the symptoms of a chronic disease, in its last stage. He attended her carefully, but to no purpose. She died on the 18th day. He supposed the disease was seven or eight months old. Dr. Dow informs us, he was called to visit her soon after the defendant bought her, and he recognised her as a former patient of his, whom he had attended seven months before.

That the defendant informed the court, that he purchased the slave about seven months before he sold her to the plaintiff; and some days after, discovered "that she was sick, and had been so at the time and previous to the purchase; and not knowing that he had a redhibitory action against his vendor, he caused her to be sold at auction, and the plaintiff purchased her."

He did not cause the sickness to be dis-

closed to the bidder; and when the plaintiff informed him that she was sick, he did not admit that she was, and that this was the reason he sold her; but falsely declared, he did not know that she was, but meant to sell her (as he had bought her) with a warranty of redhibitory diseases.

That the impression on the mind, after maturely weighing the testimony, is, that at the time Dr. Dupuy saw her, she laboured under a disease then incurable; the seeds of which existed in her for nine or ten months before the sale.

That a distinction was attempted to be made between a disease incurable in its nature, and one curable in its origin, but in a stage of incurability, on account of its progress; that he had conversed with medical men of talents, on a point like this; and was not able to draw correct information from them or medical books; and they hardly recognise any disease, which, in its incipient stage, may not yield to the healing art. Surely if a vendor is not permitted to sell a slave attacked with a disease (if such there be) incurable in its incipient stage, it cannot be lawful to sell him attacked by one, which might once have been cured, but has

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become absolutely incurable by its progress, without disclosing the fact; it is difficult to see any difference in the turpitude of either sale, and it is believed, there is not any in the illegality.

That it was said, that the court ought to have reversed the judgment of the parish court, because, from the circumstance of Dr. Dupuy swearing that he conceived the disease incurable when he was called, the judge has drawn an illogical conclusion, that it was so at the time of the sale.

The court often said, that on questions of fact, the conclusion of a jury or of a judge *a quo*, would have considerable weight with it, and could not be disregarded, unless it appeared manifestly wrong; and in a late case, its appearing so, they thought it best to send the record back, with directions to the judge to submit the question to another jury. When a case is submitted to a jury on distinct issues of fact, unmixed with any legal questions, the law makes the finding of a jury conclusive in this court.

That the act of sale, bears date the 9th of May, and the doctor attended her, for the first time, on the 17th. So that during the

intermediate days, the disease may have reached its stage of incurability, and so *non constat*, that the disease was incurable on the day of sale: the neglect of the vendee to have the slave attended by a physician, is also presented as a probable cause of the disease having reached its stage of incurability.

The defendant might have put this question beyond a doubt, by enquiring from the doctor, whether he conceived that had he been called eight days before, he might have cured her. Many diseases are deceiving in their appearances, and often a resort is not had to medical men, till family remedies appear unsuccessful. If the defendant had thought it of any avail, he might have questioned Giguel, the friend under whose care the plaintiff placed the slave, and he might have known what care was taken of her. Perhaps the plaintiff was lulled into security by the false statement of the defendant, that he did not know that a slave, whom he sold after keeping her two months, had any ailment.

That the merits of the case are certainly with the defendant; *certat de damno vitando*, he seeks to avoid a loss, by rescinding a sale to which he was induced to accede, on the as-

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surance that the vendor knew not of any ailment in the slave. The defendant *certat de lucro captando*, unconscientiously to gain the price of a slave really worth nothing at all. He seeks to enrich himself by the loss of the plaintiff. The former must, therefore, be held to very strict proof of his allegations.

That much stress was laid on the plaintiff's knowlege of the sickness of the slave, before he executed the deed; a circumstance which is presented as destroying his right to the redhibitory action. This would be the case, if he had not insisted on the warranty. But the representation of the vendor, that there was a warranty against redhibitory defects, appears to have induced him to sign the act, and pay the price. The knowlege of the vendee does not prevent his availing himself of the redhibitory action, says *Pothier*, when he has stipulated that there should be a warranty. *Traité du contrat de vente, n.* 209, *ff. l.* 4, *sec.* 5, *de dolo et met.* But in the present case, the plaintiff, though he had discovered something was the matter with the slave, appears to have been ignorant that her indisposition was a tedious one. His vendor assured him he had no knowlege of the slave

being sick, though this knowlege was the inducement he had to sell; and hinted, that if the disorder was a redhibitory one, the vendee was secured by the clause of warranty.

That it is objected, that the court erred in affirming the judgment of the parish court, who did not consider the case in its true light, that the vendee bought for $500, the hope of curing a slave, who had, but one month previous, sold for $900; and the proof of this is presented in his placing the slave in the hands of a physician; causing her to be treated as sick, during one month, though the physician had told him, he supposed her incurable, and not claiming, or performing any act conservatory of his pretended right, till that hope had vanished.

This care, which the plaintiff is now said to have taken of the slave, must acquit him of any neglect of her cure, and repel the idea that it was for want of attention to her, that the disease so far progressed, while she was in the plaintiff's hands, as to reach its period of incurability.

That every thing on the record contradicts the assertion, that the plaintiff did intend to purchase any other but a sound negro; at least,

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any but one free from an incurable disease. The auctioneer was directed by the defendant to sell a negro, without disclosing any thing of her being sick; though the vendor knew she was, and this circumstance alone induced him to sell. It is true, she was sold for a little below the price at which the defendant had bought her. But this circumstance happens daily in sales at auction.

The judge thought there was nothing in what was offered, to induce the court to grant a rehearing, or that could authorise it. The plaintiff had fully proven his case. He might have demanded the rescission of the sale, on account of the false declaration of the vendor, that he knew not of any ailment of the slave; but he had put it on the fairest ground. He had stated, he bought a slave, whom he knew before the execution of the act of sale, but not when he bid her off, to be sick. He knew not whether the disease was curable or not; he hesitated to pay his money, and paid it on the assurance, that if the disease was incurable, his money would be returned. The event has made what was doubtful certain,

He concluded that no rehearing ought to be granted.

Mathews, J. observed, that he had attentively considered the reasons offered on the part of the appellant, for a reconsideration of this case, and was not able to discover that justice, or a proper application of the principles of law on which it depends, require any change in the judgment heretofore pronounced.

The nature of the action, the evidence on which the respective rights of the parties rest, and the law that must govern the case, had been so fully and satisfactorily examined and explained by judge Martin, that he deemed it scarcely necessary to add any thing to what has been said.

The plaintiff's right to recover, depends on a proper interpretation of the 80*th art.* of the *Civ. Code*, wherein it treats of the warranty of defects of things sold, and redhibitory vices.

This law, after enumerating three distinct cases by name, as redhibitory defects, proceeds to express generally, that all other diseases and infirmities which are incurable by their nature, so that they render the slave subject thereto, unfit for the service for which he is destined, &c., do authorise a redhibitory action. The difficulty in the interpretation of

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this article, consists in the proper meaning to be given to the words, *incurable by their nature.* He had made some enquiries, and looked a little into the subject of nosology, and had not been able to discover in the classification of diseases, any class of them which are said to be incurable in their nature. It is certainly the nature of all diseases to give pain, and interrupt more or less the ordinary pursuits and labours of men, and to cause death, especially "when any of the principal organs of animal life are attacked."

He believed the just and true meaning to be given to our laws, on the subject of diseases in slaves, is that whenever the evidence in the case shews that the slave was diseased at the the time of sale, and that such disease progresses without interruption, so as to entirely destroy the utility of the slave, it ought to be considered as a redhibitory defect; unless it appears clearly that the purchaser knew the nature and extent of the disorder, and consented to purchase under all risks. This would be purchasing the hope or chance of gain. But it is clear from the evidence in the present case, that St. Romes had no intention of making such a pur-

chase. He bought with a guarantee against the diseases provided for by the *Civ. Code*; and from all the circumstances shewn by the testimony, the court was of opinion that the slave was, at the time of sale, afflicted with one of those diseases.

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CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF LOUISIANA.

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WESTERN DISTRICT, AUGUST TERM, 1821.

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An order of seizure cannot be obtained on the affidavit of the plaintiff, that the money is unpaid; and of another person, that the endorsement of the note is in the hand-writing of the original payee. If it should, the defendant may have it set aside, on shewing the irregularity, & without denying the plaintiff's right to the money.

WRAY vs. *HENRY.*

APPEAL from the court of the sixth district.

MARTIN, J. The plaintiff, endorser of the defendant's promissory note, the payment of which was secured by mortgage, obtained, on his affidavit, that the amount of the note was unpaid, and on that of another person, that the endorsement was in the hand writing of the original payee, an order of seizure.

The defendant obtained a provisional injunction, on a suggestion that the original payee had not divested himself from his interest by an authentic act, and that there was no authentic act, evidencing the plaintiff's in-

terest; so that the order of seizure had been improvidently granted.

The injunction was made perpetual, and the plaintiff appealed.

His counsel urges, that the court *a quo* erred, inasmuch as the defendant did not deny the plaintiff's right, but complained only of the want of evidence of it, and that, at all events, there ought to have been judgment that the defendant pay the money, and that the mortgaged property be levied upon.

It appears clear to me, that the order was improperly granted. A judge at his chamber cannot try a question of fact, a matter *in pays*, *viz.* the verity or genuineness of an endorsement, or the signature of a party to a *sous seing prive*. All the positive facts, in a case like the present, must be established before him, by authentic acts. The negative one, that the money is not paid, is before him, required to be made out by the oath of the creditor, although, generally speaking, one be not bound to prove a negative.

If the order of seizure issued improperly, the defendant had only to shew this, to procure it to be set aside. He had no need to go into the merits of the case. It sufficed, that he

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should make it appear, that the requisites of the law were not complied with. The plaintiff having prayed for an order of seizure only, the court could not proceed to give him judgment. The defendant not having been cited, was not bound to answer any claim or demand of the plaintiff. He came into court for the sole purpose of shewing, that the order of seizure issued improvidently. He was rather a plaintiff than a defendant.

I think we ought to affirm the judgment of the district court with costs.

MATHEWS, J. I concur.

It is therefore ordered, that the judgment of the district court be affirmed with cost.

Scott for the plaintiff, *Thomas* for the defendant.